BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALLISON R. HOWARD Claimant	)	
VS.	)	
JOHNSON CONTROLS, INC. Respondent	)	Docket No. **1,061,151**
AND	)	
INDEMNITY INS. CO. OF N. AMERICA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 25, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Thomas Hammond, of Wichita, Kansas, appeared for claimant. Vincent Burnett, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated September 11, 2012; the discovery deposition of Allison Howard taken August 3, 2012;[1] the court-ordered independent medical examination report of Dr. Paul Stein dated October 25, 2012; and all pleadings contained in the administrative file.

The ALJ found:

> 1. Claimant has demonstrated by a preponderance of the evidence that she sustained injury by repetitive trauma while working for respondent. The Court is persuaded by claimant's testimony and the independent medical examination report of Dr. Paul S. Stein and agrees with Dr. Stein that "...the prevailing factor for the numbness and tingling in her hands is the work activity at Johnson Controls."
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> 2. The date of injury is May 16, 2012. Notice of injury by repetitive trauma was timely reported to respondent.

[1] The parties agreed claimant's discovery testimony is part of the record. P.H. Trans. at 6-7.

3. Claimant is entitled to medical care. Dr. J. Mark Melhorn is the authorized treating physician for all treatment, tests and referrals. Any change to Dr. Melhorn's authorization must be approved by the Court.

ISSUES

Respondent claims the ALJ erred in finding claimant met with personal injury by repetitive trauma arising out of and in the course of her employment with respondent and in finding claimant gave respondent timely notice of her injury.

Claimant argues the ALJ's Order should be affirmed.

The issues raised on review are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment with respondent?

2. Did claimant provide respondent with timely notice of her injury?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began employment with respondent as an assembler on May 23, 2011. Immediately prior to that date, she worked for respondent for approximately three months through a temporary staffing agency, Staffmark. Claimant worked on the line-wire assembly line, which required her to screw a control box onto an air conditioning unit, pull through 12 wires, and then hook up the wires. Claimant performed the same job working for respondent via Staffmark as she performed working directly for respondent.

Claimant testified it took her approximately two minutes to assemble each unit and that she worked on 100-190 air conditioners per day. Claimant's job for respondent was changed to building motors on May 16, 2012, the date she told her team lead, Hoy Sun, she was having problems with her hands. Mr. Sun relayed that information to claimant's supervisor, Mike Slab. Claimant completed an "INJURED EMPLOYEE INFORMATION FORM"[2] on June 4, 2012. The following exchange occurred at claimant's deposition:

> Q. Now, you started that statement by saying your hands were bothering you more than they had ever bothered you before. That implies to me that you had had [sic] problems with your hands before.

[2] P.H. Trans., Cl. Ex. 1.

A. Yes.

Q. When did you first have problems with your hands?

A. I was having trouble with my hands, just minor things. I wasn't aware. Tingling and things like that. Then when the pain got severe is when I reported it to my job and let them know it was starting to get like unbearable to do my work.

Q. That is the May 16th date, correct?

A. Yes.

Q. But go back when you said you had some tingling, and if I understand you correctly, you are saying you didn't really relate it to your activities at work at that time?

A. No, I was unaware that it all had occurred from being at work.[3]

Claimant denied having problems with her upper extremities before she started working at respondent's facility.

On February 25, 2011, claimant sought medical treatment at the emergency room (ER) of Via Christi St. Francis Hospital for numbness in her right hand, causing her to awaken at night. Claimant was diagnosed with right arm paresthesia. On June 29, 2011, claimant was seen again in Via Christi's ER due to pain in her hands. She was diagnosed with overuse syndrome. Claimant was not told her diagnosis in the 2011 ER visits, nor was she told the cause of her symptoms. Claimant testified that following the two ER visits in 2011, her symptoms went away. In the first part of 2012, the symptoms returned and worsened.

Claimant sought medical treatment with her personal care physician, Dr. David Lauer, on April 6, 2012, due to pain in both hands. Dr. Lauer diagnosed carpal tunnel syndrome and prescribed medication and wrist splints. Claimant returned to see Dr. Lauer on April 25, 2012, due to worsening numbness and weakness in both hands, right greater than left. An electromyogram/nerve conduction study was recommended.

When claimant saw Dr. Lauer on the two occasions in April 2012, she and the doctor discussed the possible diagnosis of carpal tunnel syndrome, however, the doctor did not mention anything to claimant about the cause of her hand complaints. Claimant testified at the preliminary hearing:

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[3] Howard Depo. at 15.

Q. What happened that made you report it, to go in and report it that it was work related?

A. I talked to co-workers on my line, and they had informed me that it had been caused from work, that I needed to let my job know that; if I was having pains when I was at work, then it was work related and I needed to let them know.

Q. When you reported it to a supervisor, who did you report it to?

A. I first reported it to my team lead, and then he reported it to my supervisor, Mike Slab.[4]

. . .

Q. Okay. So you knew as of April 6th, 2012, that you had carpal tunnel syndrome.

A. No. I wasn't for sure what -- I mean, what exactly it was. He said it could be carpal tunnel. It could be that I needed to have tests performed to clarify exactly what it was.

Q. And the tests, you're talking about the EMG/nerve conduction study; correct?

A. Yes.

Q. Did he recommend that test on the very first visit, on April 6th, 2012?

A. No.[5]

Dr. Paul Stein performed a court-ordered medical examination on October 25, 2012. Claimant told Dr. Stein she had numbness and tingling in both upper extremities. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Stein provided a narrative report to Judge Barnes in which he opined: "[W]ithin a reasonable degree of medical probability, the prevailing factor for the numbness and tingling in her hands is the work activity at Johnson Controls."[6] Dr. Stein recommended EMG/NCV testing.

Claimant continues to work for respondent and experiences pain, numbness and tingling in her upper extremities.

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[4] P.H. Trans. at 12-13.

[5] *Id.* at 22-23.

[6] Stein IME report (Oct. 25, 2012) at 4.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 provides in part:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2012 Supp. 44-520 provides:

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from

> the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

The undersigned Board Member agrees with the ALJ that claimant, pursuant to the provisions of K.S.A. 2012 Supp. 44-508(e)(f) and (g), proved she sustained personal injury by repetitive trauma arising out of and in the course of her employment with respondent, Claimant also proved respondent was provided with timely notice.

The evidence is undisputed that claimant developed bilateral carpal tunnel syndrome following the commencement of her job at respondent in approximately February 2011. Claimant's job required the use of both upper extremities in a repetitive manner throughout her work day. There is no evidence claimant experienced carpal tunnel syndrome, or any other repetitive use injuries, to her upper extremities before she started working for respondent. There is no evidence that any non-work related activity caused claimant's symptoms.

Claimant initially developed carpal tunnel complaints–upper extremity pain, numbness and tingling–which caused her to seek ER treatment in February 2011 and again in June 2011. Her symptoms recurred in early 2012, as claimant continued to perform the intensive hand and arm work for respondent. Claimant's symptoms worsened over time and claimant advised respondent of her situation when the symptoms became unbearable.

Claimant's testimony was consistent with her allegations of repetitive trauma due to the mandates of her job for respondent. Moreover, there was only one expert medical opinion in this record addressing causation and that was expressed by Dr. Stein, a neutral physician. In Dr. Stein's opinion, the prevailing factor for claimant's upper extremity symptoms was her work for respondent. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[7]

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[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Respondent likely had actual knowledge of claimant's injury on May 16, 2012, thus making notice unnecessary. However, even if respondent did not have actual knowledge, notice was timely.

Whether notice is timely depends on the date of injury by repetitive trauma, which is a legal fiction.[8] Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma or 30 days from the date of injury by repetitive trauma, whichever came first. The Appeals Board has interpreted the 20-day notice requirement as 20 days from the date claimant first sought medical treatment for the repetitive trauma injury after the date of the injury by repetitive trauma has been established under K.S.A. 2012 Supp. 44-508(e).[9]

With the exception of Dr. Stein,[10] no physician took claimant off work or placed her on modified or restricted duty due to her diagnosed repetitive trauma. Claimant still works for respondent and there was accordingly no "last day worked." The only physician who expressed an opinion that claimant's condition was work-related was Dr. Stein, whose report was dated October 25, 2012, the date he examined claimant. The date of claimant's repetitive trauma was either the date claimant was provided with modified or restricted duty by Dr. Stein or the date claimant received Dr. Stein's report (assuming Dr. Stein did not advise claimant verbally her condition was work-related). The record is unclear when claimant received that report or was advised of its contents. For purposes of this Order, claimant's date of injury by repetitive trauma was October 25, 2012. The date of injury by repetitive trauma was not May 16, 2012.

Claimant provided respondent with timely notice on May 16, 2012. Notice can be provided before a legal date of injury by repetitive trauma.[11]

CONCLUSION

1. Claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment with respondent.

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[8] *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[9] See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

[10] Dr. Stein recommended claimant "avoid frequently repetitive use of either hand, especially with the use of vibrating equipment or impacting power tools."

[11] *Barrett v. Wal-Mart*, No. 1,059,815, 2012 WL 6811294 (Kan. WCAB Dec. 11, 2012); *Whisenand v. Standard Motor Products, Inc.*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012).

2. The date of claimant's injury by repetitive trauma was October 25, 2012, and notice was therefore timely provided to respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, the undersigned Board Member finds that the June 25, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is modified to reflect an October 25, 2012 date of injury, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this 4th day of October, 2013.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Gary Jones, ALJ

[12] K.S.A. 44-534a.

[13] K.S.A. 2012 Supp. 44-555c(k).